

Anderson, Ross Gilbert (2014) *Scots law and the UK codification of bills of exchange*. In: Milo, J.M., Lokin, J.H.A. and Smits, J.M.(eds.) Tradition, Codification and Unification. Series: Ius Commune: European and Comparative Law Series (128). Intersentia, Antwerp, pp. 121-144. ISBN 9781780682235

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Deposited on: 17 June 2014

## SCOTS LAW AND THE UK CODIFICATION OF BILLS OF EXCHANGE

### 1. Introduction

Codification and harmonisation are neither synonyms nor mutually exclusive. There can be harmonisation without codification; codification without harmonisation; and harmonisation through codification. Each of these may or may not accord with prior traditions.

Scottish views on harmonisation and codification, however, have rarely been coherent. So in the twentieth century, the Scottish legal academy was dominated by two giants: Sir Thomas Broun Smith QC, first of Aberdeen and then of Edinburgh; and David M Walker QC, the Regius Professor of Law at Glasgow. It is not clear whether they ever much spoke to each other, at least if an infamous exchange of correspondence in the *Modern Law Review* is anything to go by.<sup>1</sup> For present purposes it is sufficient to draw attention to their views on codification. Smith's views on this subject, it has been said, "were complex and often elusive... Perhaps his thought was not wholly consistent over time. Perhaps it was not wholly consistent at a given time":<sup>2</sup> for though Smith sparked the civilian renaissance in Scots law, he saw codification as a means of harmonising Scots commercial law with English law. Professor Walker is still with us. Perhaps the most prolific writer on Scots law of all time, he nonetheless wrote almost nothing on comparative law, harmonisation or codification. But an interesting insight is found in a review, of a recent English translation of the BGB, which appeared in the 1976 issue of the *Juridical Review*. Walker wrote of, "how much better off we should be if we had

University of Glasgow.

<sup>1</sup> (1963) 26 *Modern LR* 466 and 607. For a readable appraisal of Smith's contribution to Scots law, see K G C Reid, "While One Hundred Remain: T B Smith and the Progress of Scots Law" in E Reid and D Carey Miller (eds) *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 1.

<sup>2</sup> G L Gretton, "The Rational and the National" in E Reid and D Carey Miller (eds) *A Mixed Legal System in Transition* (2005) 30.

codified in the nineteenth century.”<sup>3</sup> But, for Walker, the attraction of codification would have been as a national prophylactic against unwanted foreign advances: his pupil, Lord Rodger of Earlsferry once described his outlook as “extremely conservative with a (Scottish) nationalist bias”.<sup>4</sup> Codes can be used to build borders as well as to remove them. Sometimes they do both. But whatever a code seeks to achieve, a code is also a fashion statement: the *Code civil* is as symbolic for France as the Scottish kilt.

## 2. Tradition endures

The Scottish legal tradition has, at different points of its history, been receptive to a number of outside influences, yet it has proved remarkably resistant to imposed harmonisation. A few points are worth briefly highlighting. Scotland has never endured a revolution, at least not one that caused any major break with the past. There has been no codification and, in the law of obligations at least, almost no legislation. Where legislation is encountered, it is legislation to savour. The Scots law of set-off, for instance, is governed, to this day, by the single sentence of the Compensation Act 1592.<sup>5</sup> On reflection, although no one considers it to be such, perhaps that was a codification of sorts. Moveable property, with the exception of the Sale of Goods Act, is similar. The history of Scots private law has largely been one of continuity.<sup>6</sup>

The next point to highlight about Scotland is that, in 1707, Scotland and England voluntarily entered into a political union. There was no war. There was no imposition of terms by one side or another.<sup>7</sup> That political union has endured and, despite a difficult start, has largely thrived. That union gave birth to a common market; and to a common market with a common language. The harmonisation forces were thus strong, a point worth emphasising since, for the best part of three hundred years – from the dissolution of “the Parliament of Scotland” in 1707 until the opening of the “Scottish Parliament” in 1999 – the Scottish legal system has

<sup>3</sup> D M Walker, “Review of I S Forrester, S L Goren and H-M Ilgen, *The German Civil Code* (1975)” (1976) 21 *Jur Rev* 95 at 96.

<sup>4</sup> A F Rodger, “Good Companion?” (1983) 1 *OJLS* 257 at 259.

<sup>5</sup> APS III, 573, c 61.

<sup>6</sup> The Dutch history is rather different: J H A Lokin and W J Zwolve, *Europese Codificatie-geschiedenis* (2<sup>nd</sup> edn 1992) 274 ff; J H A Lokin, “Die Rezeption des Codes Civil in den Nördlichen Niederlanden” 2004 *ZEuP* 932. The introduction of the Code Napoleon to the Netherlands in 1809 led to a break with the past; and the legislation of 1829 expressly repealed any force otherwise accorded to Roman law as an authority in order to introduce a new civil code in 1830. The original Dutch *Burgerlijk Wetboek*, introduced in 1838, also prohibited reference to common law sources to aid interpretation.

<sup>7</sup> A readable and scholarly account is in M Fry, *The Union: England, Scotland and the Treaty of Union of 1707* (2006) who, at 218, remarks that “Scotland belonged to the Dutch rather than the English commercial system, with 16,000 Scots serving in the merchant fleet of the Netherlands.”

survived intact with Scottish private law largely unaffected by English law,<sup>8</sup> though Scotland has had no native legislature. The analogy of national legal systems within a wider EU is obvious.

Throughout this period, however, the relationship of Scots law to English law has been regularly questioned, in the same way as the relationship between national European systems and proposed harmonisation is questioned today. Some polemics have highlighted the colonial and nationalistic tendency of English judges ignorant of any law other than their own.<sup>9</sup> But it is important to point out that, at various periods over the last three centuries, the greatest advocates for harmonisation of Scots private law have been Scots themselves.<sup>10</sup>

### 3. The law of assignment

#### 3.1. The General Part

In this paper I wish to explore the dynamics of national traditions, codification and unification from the perspective of Scots law within the great political power of its time: the British Empire. And I wish to do so within the confines of a narrow furrow within a particular field of private law: the law of assignment (*scotice*: assignation). Assignment is a classic *Allgemeiner Teil* subject. The general part of patrimonial law (*Vermogensrecht in het algemeen*) – to use the heading of Book 3 of the *Burgerlijk Wetboek* – is perhaps the paradigm area where a lawyer from an uncoded system can most clearly see the benefits of codification. Case law systems, ever focused on the cut and thrust of litigation, have a tendency to ignore fundamentals. The general parts of the major European civil codes contain well formulated legal rules on subjects that are rarely mentioned, far less refined, in non-codified systems. Scots law, of course, as a result of a shared tradition, is better equipped to make these connections because Scots law at least recognises the concepts contained in the general part. For this paper, however, I wish to focus on one UK attempt to formulate a rule on the law of assignment in a partial codification: the law of bills of exchange.

<sup>8</sup> The law of negligence within the law of delict is one area where there has been a complete assimilation. It is a curious historical fact that the foundation cases of the common law of negligence are Scottish, though they bear little of the Scottish legal tradition.

<sup>9</sup> A Dewar Gibb, *Law from over the Border* (1950). But local laws were allowed prevail in many parts of the British Empire. So the Privy Council has given judgment on matters of Roman Dutch law as applied in South Africa and Ceylon; or on the French law that prevailed in Canada; or on the *droit coutumier* as applies in Jersey and Guernsey. For an analysis of Privy Council decisions on Roman-Dutch law in the context of security, see J M Milo, "Floating Charge in civiele traditie: Het Wetboek Napoleon ingerigt voor het Koninkrijk Holland als venster op verleden en heden van generale zakelijke zekerheidsrechten" in J H A Lokin, J M Milo and C H van Rhee (eds) *Tweehonderd Jaaren Codificatie van het Privaatrecht in Nederland* (2010) 73 at 93-95 and his contribution in this volume at xxx below.

<sup>10</sup> A point that is often overlooked. See further n 25 below.

### 3.2. History

Claims (*créances/vorderingen*) were not, for much of European legal history, freely assignable: in the colourful language of the Glossators, “the action arising from the obligation hinges on the bones and entrails of the creditor and can no more be separated from his person than the soul from his body.”<sup>11</sup> The prohibition necessitated the development of functional equivalents in the law of mandate such as the *procuratio in rem suam* (the mandate to uplift) or the mandate to pay (an institution which, in other civil law systems, is sometimes referred to as an “Assignment”).<sup>12</sup> The Roman position had an enduring influence: an un-codified rule whose force was as strong as if it had been set in stone. For, although some of the jurists of the *ius commune* came to recognise the transfer of claims, they continued to describe claims as being, of their nature, inherently non-transferable.<sup>13</sup> Generally speaking, particularly with the German codes, it was only with modern codifications that the modern civil law, in this subject, began to approach cession of claims coherently: *Vorsprung durch Kodifizierung*.

### 3.3. Bifurcation: Private Law and Commercial Law

But for all of the writings on the civil law, with their assertions that claims were intrinsically non-transferable, commercial law had long facilitated the circulation of claims. The use of commercial paper and reification was one of the ways in which this was achieved. The result was a bifurcation of the law on the transfer of claims: what was apparently prohibited in the civil law was actively practised in commercial law. The trend is evident in English law too: choses in action became assignable at law only in 1875,<sup>14</sup> despite the fact that circulation of credit by use of bills of exchange had been practiced for at least two centuries. The Scottish experience, in this respect, was rather different. The substantive approach has always been unitary: the civil law prohibition on assignment appears never to have been part of Scots law. By the fifteenth century at the latest, claims were apparently

<sup>11</sup> R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990; repr 1996) 58 and authority there cited. See too F H Grosskopf, *Geskiedenis van die Sessie van Vorderingsregte* (1960); K Luig, *Zur Geschichte der Zessionslehre* (1966); W J Zwalve, *Hoofdstukken uit de Geschiedenis van het Europese Privatrecht I: Inleiding en zakenrecht* (1993) 265 ff; C Hattenhauer, “Übertragung einer Forderung” in J Ruckert, M Schmoeckel and R Zimmermann (eds) *Historisch-kritischer Kommentar zum BGB* (2007); R G Anderson, *Assignment* (2008) para 4-18; F Ranieri, *Europäisches Obligationenrecht: Ein Handbuch mit Texten und Materialien* (3rd edn 2009) ch 10.

<sup>12</sup> *Codex Maximilianeus bavaricus civilis* 4, 15 § 7 (1756); §§ 1400 ff ABGB (still in force today); The old Dutch *Wetboek van Koophandel*, Art 210: S P Lipman, *Wetboek van Koophandel vergeleken met het Romeinsche en fransche Regt* (1839); the Swiss *Obligationenrecht / Code des obligations*, curiously, uses “Assignment” only in the French text: Art 471. For a discussion of the mandate to pay in English, see Anderson, *Assignment* para 3-14 ff and 4-41 ff.

<sup>13</sup> See Zwalve, *Hoofdstukken uit de Geschiedenis van het Europese Privatrecht I* (1993) 279ff for the natural law in the Netherlands, Scotland and France (including at 283, n 47, reference to Stair’s incoherent analysis); and 299 ff for the position in German-speaking territories.

<sup>14</sup> When the Supreme Court of Judicature Act 1873 came into force.

freely transferable on notice (“intimation”) being made to the *debitor cessus*.<sup>15</sup> Only later did the institutional writers<sup>16</sup> – fresh from studying Roman law in the Netherlands – graft on to the Scots common law of assignation the orthodox history of the civil law of *procuratio in rem suam*. But, even by then, the die had been cast; the *procuratio* references were window-dressing: for the law had already been settled that assignation was a transfer. And, in the case law, wherever there was a conflict between *procuratio* and transfer, transfer prevailed.<sup>17</sup>

Elsewhere, however, the influence of a bifurcated approach between civil law and commercial law has endured. Even in modern civil law systems, one regularly finds that contractual prohibitions on assignment are effective *erga omnes* under the civil law, but only relatively valid under commercial law.<sup>18</sup> Similarly, most legal systems require *some* formal acts to assign a claim in security or to take control of the claims so assigned on default; unless, that is, the claims are “financial collateral”, where EU legislation now allows the parties to financial collateral arrangements to make up the law for themselves.<sup>19</sup>

### 3.4. Mandates

In Roman law, and in many other systems that have drawn on it, functional equivalents to cession were developed. The *procuratio in rem suam* (a mandate in favour of the putative assignee to uplift the claim from the *debitor cessus*) was one way. Another was for the drawer to address a mandate to his debtor: the order or mandate to pay (*Anweisung*).<sup>20</sup> Often confused with each other, the two mandates are distinct, and the distinction has, in principle if not always in practice, long been recognised in Scots law.<sup>21</sup>

The mandate to uplift utilised the “in rem suam” designation, i.e. for the sole benefit of the mandated party, for practical reasons: were it otherwise, the mandatory, having uplifted the debt due by the *debitor cessus* would be bound to account for the money to the original creditor. The mandate to pay, on the other hand, is different. This cannot be in rem suam. To couch a mandate to pay in such terms that it is in rem suam is meaningless: the drawee can only be asked to pay; there is nothing that the

<sup>15</sup> The second oldest case in *Morison’s Dictionary of Decisions* is *Drummond v Muschet* (1492) Mor 843 appears to hold that intimation to the *debitor cessus* is essential for an assignation.

<sup>16</sup> The legal writers, who wrote in the seventeenth, eighteenth and nineteenth centuries, whose opinions have a special status in Scots law. See K Luig, “The Institutes of National Law in the Sixteenth and Seventeenth Centuries” 1972 *Juridical Review* 193.

<sup>17</sup> See Anderson, *Assignment* (2008) 5-13 ff.

<sup>18</sup> Compare § 399 ff BGB with § 354a HGB; or Art 1690 *Code civil* with Arts L 313-23 and R 313-15 *Code monétaire et financier*.

<sup>19</sup> Financial Collateral Directive 2002/47/EC.

<sup>20</sup> For the Scottish sources, see G L Gretton, “Mandates and Assignations” (1994) 39 *JLSS* 175. But the confusion is found elsewhere too.

<sup>21</sup> *Earl of Mar v Earl of Callender* (1680) Mor 2927; *Morice v Sprott* (1846) 8 D 918; *Willet v Ramsay* (1904) 12 SLT 111 OH.

drawee can retain for his own benefit. It is only on the drawee's acceptance that the holder of the order has any direct right of action on the order against the drawee.<sup>22</sup>

The mandate to pay is inherently revocable by the drawer.<sup>23</sup> The mandate in *rem suam*, in contrast, is irrevocable. A bill of exchange is couched in terms of a mandate to pay, not a mandate to uplift. A major reason for using a bill of exchange instead of a cession or *procuratio in rem suam* was to avoid the consequences of cession: in particular, the requirements (in Scots law at least) of formal notarial intimation; and, in all systems, the "*assignatus utitur iure auctoris rule*" whereby the debtor cessus can plead defences held against the cedent against the assignee. A mandate in *rem suam* was unsuitable for commercial activity because, as in a cession, the debtor would be able to plead his defences against the mandatory.

## 4. Codification in the UK: bills of exchange

### 4.1. Introduction

The legal systems of the UK are uncoded. Nonetheless, there are many areas of the law where legislation has consolidated the law into subject-specific, mini-codes.<sup>24</sup> These statutes are largely the product of a UK fashion, in the second half of the nineteenth century, for internationalism, harmonisation and codification;<sup>25</sup> a fashion for which Scots were particularly enthusiastic.<sup>26</sup> The late, and much missed, Lord Rodger of Earlsferry has provided a scholarly and characteristically readable account of this movement.<sup>27</sup> Of immediate interest is the tendency to bifurcation: at its height, the movement's focus was for a Code of Commercial Law for the British

<sup>22</sup> See, for example, *Code de commerce* Art L 511-19. See too J Fontaine, *Etudes sur la lettre de change* (1922) No 28, p 66 who speaks of the « transformation profonde » which occurs on acceptance.

<sup>23</sup> See cases cited at 5.3 below.

<sup>24</sup> Cf A Rahmatian, "Codification of Private Law in Scotland: Observations by a Civil Lawyer" (2004) 8 *Edinburgh Law Review* 31.

<sup>25</sup> See *Report of the Proceedings of the conference on the Assimilation of the Commercial Laws of England, Ireland and Scotland, held in the rooms of the Law Amendment Society, 21 Regent Street London, on 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> November 1852* (1852).

<sup>26</sup> See William Chambers' address *The Assimilation of the Laws of England and Scotland, delivered at the Conversazione of the Scottish Trade Protection Society, February 3<sup>rd</sup>, 1862* (1862). The whole address, particularly on the risks taken "with other people's money", has a contemporary resonance; interesting too is the boast that, in 30 years of business, he had neither given nor discounted a bill of exchange! The Chambers brothers' publishing business continues to this day. Sir Thomas Barclay, a Scot, called to the English bar, who lived for most of his professional life in Paris, assumed, in contrast, that his countrymen were "as proud of their laws as their mountains and are little favourable to the idea of assimilation": T Barclay, *Les Effets de commerce dans le droit anglais* (1884) Preface, ii: "les Eccossais... fiers de leur droit comme de leurs montagnes, sont peu favorables à l'idée de l'assimilation". Barclay, on this as on other points, is readable but inaccurate. For further information on Barclay, see n 89 below.

<sup>27</sup> A F Rodger, "Codification of Commercial Law in Victorian Britain" (1992) 108 *Law Quarterly Review* 570.

Empire.<sup>28</sup> Private law alone was never seriously considered for codification – at least for the UK as a whole.<sup>29</sup> No such grand codification, however, was ever realised. And instead a series of mini-codes: the Bills of Exchange Act 1882, the Partnership Act 1890, the Sale of Goods Act 1894 and, some years later, the Marine Insurance Act 1906, endure to this day as the monuments to an ambitious age.

I wish to focus only on the Bills of Exchange Act 1882; a statute which has attracted lavish praise and opprobrium in equal measure. The 1882 Act was not initially intended to extend to Scotland. As Lord Rodger has shown,<sup>30</sup> the movement for application of the Act to Scotland came from the Scottish business community and, indeed, Scottish academic lawyers.<sup>31</sup> These lawyers secured not only the application of the Act to Scotland, but three carve-outs from the general rules which applied to Scotland alone – no mean feat in an Act that was intended to codify the law not only in the UK, but throughout the Empire. One of these was a provision on assignment: the so-called “funds attached” rule.<sup>32</sup> The provision provides a case study in a UK codification of entrenchment of a perceived national tradition by codification.

Before we turn to look at the history of the “funds-attached” doctrine in Scotland and elsewhere, however, it is perhaps necessary to justify the need for examining the history of the rule at all. The short answer is that, tucked away in the provisions of the Banking Act 2009 – the UK Parliament’s primary response to the 2008 financial crisis – were provisions abrogating by stealth the “funds-attached” rule in Scotland for the most important instrument to which it applied, cheques.<sup>33</sup> Of course, the “funds attached rule” was, in the unsettling uncertainty of financial disaster, hardly high on anyone’s list of priorities. And although many and varied causes of the financial crisis have been suggested, the humble “funds-attached” rule for Scottish bills of exchange is not one of them. When Parliament, in haste, had to consider the Banking Bill, one valiant MP, Mark Hoban, queried why archaic rules on Scottish bills of exchange were covered by the emergency legislation, with this wry observation:

<sup>28</sup> J Dove Wilson, *The Formation of a Code of Commercial Law for the United Kingdom: why not begin now? An address delivered to the Chamber of Commerce of Aberdeen* (1884); *idem.*, “Proposed Imperial Code of Commercial Law - A Plea for Progress” (1896) 8 *Jur Rev* 329.

<sup>29</sup> For hints at codification of Scots private law, perhaps using the writings of George Joseph Bell in the same way as the writings of Robert Joseph Pothier has provided much of the basic material for the *Code civil*, see H Goudy, A J G Mackay and V Campbell, *Addresses on Codification of Law* (1893).

<sup>30</sup> Rodger, *Codification of Commercial Law*, n 27 above.

<sup>31</sup> Such as Professor Muirhead, Professor of Civil Law in the University of Edinburgh, who was particularly influenced by the German codifications such as the *ADWO*: see Muirhead, *Codification of the Mercantile Law: An Address read before the Edinburgh Chamber of Commerce, 25<sup>th</sup> January 1864* (1864). For discussion, see J W Cairns, “James Muirhead: Teacher, Scholar, Book Collector” in J W Cairns and C Verbeke (eds) *The Muirhead Collection Catalogue* (Belgische Commissie voor Bibliographie en Bibliologie, 1999). The main protagonist, Sheriff John Dove Wilson, we shall meet shortly.

<sup>32</sup> 1882 Act, s 53(2).

<sup>33</sup> Banking Act 2009, s 254.



“When the Paulson plan was going through the US Congress, I read with considerable amusement about the number of things covered by the plan, including excise duties and the importation of wooden bows and arrows. One assumes that that sort of thing would not happen in the UK, but clauses 231 and 232 seem to have little bearing on a Bill that is designed to increase financial stability in the banking sector. I said in connection with clause 226 that we are encouraging the Bill to go through at speed, because it aims to tackle the current financial crisis, but I wonder what role the “Funds attached rule (Scotland)” and “Financial collateral arrangements” play in supporting progress in the banking sector.”<sup>34</sup>

With this intervention, Mr Hoban did obtain the concession from the responsible minister that,

“The hon. Gentleman is right about clause 231. It is a deregulatory clause that accomplishes something that many people have wanted. It is not controversial. It is within the scope of the Bill. That is why it is here, but for me to stand here and say that it has a major bearing on financial stability would probably be pushing it a bit, if I could put it that way. It is something that many people have wanted. It benefits consumers in Scotland. It irons out a little kink in the law. That is why it is here in this part of the Bill. I put my hands up, but it is still a reasonable thing to do.”<sup>35</sup>

Two points are worth emphasising. In the first place, ancient common law rules, much debated by learned lawyers, have little traction against the inexorable force of a majority government intent on changing laws, any laws, in the name of “deregulation”: it is not beyond the realms of fantasy that some government, one day, in the name of that insidious euphemism, may try to abolish the common law of Scotland in its entirety (and perhaps some people see codification of European private law as insidious for the same reason). The second point to emphasise is that the Banking Act 2009 abolishes the funds-attached rule only for cheques. But although the rule remains for other bills of exchange, the use of bills of exchange is now fairly uncommon.<sup>36</sup> For most day-today purposes, therefore, the rule has been laid to rest, and a brief history can now be written.

#### 4.2. General Background

At the end of the nineteenth century and early twentieth century, the law of bills of exchange was for European private law what “European contract law” is today: the vogue subject for European comparative law. In the UK, the international movement coincided with reform of national law prompted by the publication of Sir McKenzie Chalmers’ *Digest of the Laws of Bills of Exchange, Promissory Notes and Cheques* in 1878. That contribution had demonstrated that, in this area, English law, the Imperial Law, was ripe for codification. As Lord Rodger has shown, the Associated Chambers of Commerce had begun to examine the area for codification,

<sup>34</sup> Mark Hoban MP, *Hansard*, Public Bill Committee, 8th Sitting, October 30<sup>th</sup>, 2008, col 261.

<sup>35</sup> Angela Eagles MP, *Hansard*, Public Bill Committee, 8th Sitting, October 30<sup>th</sup>, 2008, col 262.

<sup>36</sup> Although not unheard of. But it is not at all clear why, if the funds-attached rule is so cumbersome, it was not abolished for all bills of exchange.

but, by 1880, the “Chambers soon became rather bogged down in trying to ascertain the French and German law on the topic.”<sup>37</sup> Reflecting the internationalism so prevalent in Europe prior to 1914, the Commons committee had procured detailed reports on the legal position in France, Germany and the Netherlands.<sup>38</sup> The provisions of the Dutch *Wetboek van Koophandel* (1838)<sup>39</sup> and the German *Allgemeine Deutsche Wechselordnung* (1848)<sup>40</sup> were translated and the French provisions of the *Code de commerce* reproduced. The references were not for show. The committee gave to the provisions a consideration so earnest that the result was only inertia.

#### 4.3. Extension of Bill to Scotland

In mid-1881, as the Bills of Exchange Bill was stalling in the Parliamentary committee, the Bill did not purport to apply to Scotland. In the meantime, however, the Scottish business community was mobilizing. A parallel, and perhaps more vigorous, debate had been conducted in Scotland on the desirability of harmonisation and codification.<sup>41</sup> A sometime provincial judge in the far north east of Scotland and interested comparative lawyer, Sheriff John Dove Wilson,<sup>42</sup> was one of the movement’s most articulate and respected proponents. And it was Dove Wilson’s personal intervention, in a letter to the Chairman of the Parliamentary Committee, Sir John Lubbock MP, which resulted in the Committee considering the application of a Bill throughout the UK.

<sup>37</sup> Rodger, *Codification of Commercial Law*, n 27, 578.

<sup>38</sup> *Reports from Her Majesty’s Representatives in the Netherlands, Germany and France on the Law with respect to Bills of Exchange in those Countries Respectively* (1880) Cmnd 2609. For an excellent modern overview of the various regimes then in force in Europe, see H Coing, *Europäisches Privatrecht* vol II (1989) chapter 27; and M Schmoeckel, *Rechtsgeschichte der Wirtschaft* (2008) 98 who adopts the “transfer of claims” analysis.

<sup>39</sup> The translation was edited by the Netherlands Foreign Office. There is a French translation in M Antoine de Saint-Joseph, *Concordances entre les codes de commerce étrangers et le code de commerce français* (1844). For the history of the *Wetboek van Koophandel*, see E Holthöfer, “Niederlande” in H Coing (ed) *Handbuch der Quellen und Literatur der Neuren Europäischen Privatrechtsgeschichte* vol III/3 (1986) 3402 ff especially at 3422 ff.

<sup>40</sup> For Chalmers, the ADWO was the preferred model for reform in the UK because it was the “most elaborate and carefully worked out of the foreign codes” and because “it is an international and not merely a national Code”: *Digest of the Law of Bills of Exchange, Promissory Notes and Cheques* (2<sup>nd</sup> edn 1881) viii. The ADWO came into force on 1<sup>st</sup> May 1849 in all the states – with the exception of Austria where it came into force a year later – of the German Confederation. But for amendments in 1908, it remained in force until the introduction of the modern WechselG and ScheckG – by the Nazis – in 1933. The 1933 legislation implemented the Geneva Convention on Bills of Exchange, itself heavily influenced by the ADWO. The ADWO was also largely adopted in the Italian *codice di commercio* of 1882 (although their law of cheques was largely French) and the Spanish *Código de comercio* of 1885.

<sup>41</sup> See Rodger, *Codification of Commercial Law*, n 27, 576, n 39.

<sup>42</sup> Dove Wilson resigned his post as Sheriff in 1891, at the age of 58, to take up the chair of Scots law and Roman law at the University of Aberdeen: see generally, Rodger, *Codification*, 575-576; S Girven, “Sir John Dove Wilson of Aberdeen” 1992 *Jur Rev* 60 and A H Millar, “Wilson, John Dove (1833-1908)” rev’d R Shiels, *Oxford DNB* (2004).

At the beginning of June 1882, Dove Wilson travelled south to give evidence to the committee in person, on 7th June, chaired for the day by the Solicitor General for Scotland, Alexander Asher QC.<sup>43</sup> Wilson's representations had the desired effect. On the same day the Committee resolved to extend the Bill to Scotland.<sup>44</sup> Dove Wilson had direct input, redrafting the bill to take account of his view of Scots law.<sup>45</sup> There were only three areas where it was found that specific provision for Scots law was required: summary diligence;<sup>46</sup> parole evidence;<sup>47</sup> and the funds-attached rule.<sup>48</sup> In order to ensure that the Bill would not be opposed, Dove Wilson asserted that the kilt in which he dressed the Bill was but a consolidation of existing Scots common law.<sup>49</sup> Anyone who has been involved in law reform which requires lobbying with politicians will immediately recognise the argument. There is a common – if quite irrational – view among lobbyists and politicians that, the less proposed legislation changes, so much less will the legislation be either scrutinized or opposed. This odd argument supposes, perhaps accurately, that politicians prefer, above all else, legislation that is pointless.

Dove Wilson, probably at the suggestion of Mackenzie Chalmers and Lubbock, deployed the argument nonetheless. Having secured special treatment for Scots law, Dove Wilson asserted that the change he had secured was, after all that, actually “a point of no great importance”; a mere technicality; the sections on the effect of presentment of a bill, Dove Wilson insisted, could only come into play into bankruptcy.<sup>50</sup> And, on the subject of bankruptcy, he did not have to elaborate: everyone knew then as everyone knows now that, culturally, Scots and English lawyers approach insolvency in a very different way. The message, if not the reasoning, was tolerably clear: the bill would involve few practical changes to the law, but, at the same time, would be thoroughly beneficial in practice.<sup>51</sup>

<sup>43</sup> T Barclay, *Les effets des commerce dans le droit anglais* (1884) iv identifies Mr Williamson MP, “le sympathique membre pour le comté de Fife” as the other Scottish member of the committee. Barclay himself spent his childhood in Fife: see n 89 below.

<sup>44</sup> *Report from the Select Committee on the Bills of Exchange Bill 1882*, Parliamentary Papers, 1882 (244) VII. 585. Wilson was the only person other than Mackenzie Chalmers to be called to give evidence to the Committee.

<sup>45</sup> See M D Chalmers, *Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities* (3<sup>rd</sup> edn 1883), “Introduction”, where Dove Wilson's input is acknowledged. W Thorburn, *Commentary on the Bills of Exchange Act 1882* (1882), Preface, in contrast, attributes the drafting of the Scottish sections to Asher, on the basis of the Faculty of Advocates report written by Vary Campbell.

<sup>46</sup> 1882 Act, s 98.

<sup>47</sup> 1882 Act, s 100.

<sup>48</sup> 1882 Act, s 53(2).

<sup>49</sup> M D Chalmers, “An Experiment on Codification” (1886) 2 *LQR* 125 at 126. This was consistent with the way the Bills of 1881 and 1882 had been presented, which contained marginal notes to the case law which the provisions of the Bills were consolidating.

<sup>50</sup> J Dove Wilson, “Concerning a Code of Commercial Law” (1884) 28 *Journal of Jurisprudence* 337 at 346. See too *idem.*, “The Recent Progress of Codification” (1891) 3 *Jur Rev* 97.

<sup>51</sup> Two authoritative, yet conflicting, statements on interpretation of the 1882 Act are found in *Bank of England v Vagliano Bros* [1891] AC 107. Lord Herschell, at 144-145, emphasises that the →

## 5. The “funds attached” rule

### 5.1. *The Legislation*

What is the funds-attached rule? Until the summer of 2009, the Bills of Exchange Act 1882, s 53(2) provided that:

“[...], in Scotland, where the drawee of a bill has funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee.”

Suppose Alain owes money to Veronika. Alain has a claim against Lisa. Alain could (i) assign his claim against Lisa to Veronika; or (ii) Alain could draw on Lisa to pay Veronika. One reason for employing a mandate in terms of option (ii) is, on the assumption that Lisa accepts, to allow the bill to circulate without any further notice to Lisa being necessary to effect a transfer of the claim against her by the holder of the bill. Another reason is because Veronika does not wish to find that her claim is subject to any defences Lisa holds against Alain. Yet another reason may be because Alain wishes to transfer of his claim against Lisa only at a particular date in the future.

The funds-attached rule largely collapses the distinction between a mandate to pay and cession. The special treatment in the 1882 Act for Scotland became, in practice, increasingly irksome. In 1989, a committee set up to report on banking law recorded that it “has been strongly represented to us that the current position [with the funds-attached rule] is unsatisfactory both for the Scottish banks and for many of their customers.”<sup>52</sup> For banks it was a pain because it meant that suspense accounts had to set up as a result of presentment which interfered with the normal clearing process.<sup>53</sup> For customers, the provision was disliked because it meant that it was impossible to countermand a cheque that had been presented for payment. That

1882 Act is a code which must be interpreted independently from the prior law; the 1882 Act in parts represents a departure from the previous law. Lord Bramwell, in contrast, at 137, states that the 1882 does not alter the common law except in so far as provisions of the Act are inconsistent with it. The disagreement is illuminating because both men were intimately concerned with the passage of the 1882 Act: Herschell chaired the Commons Select Committee (see *Report from the Select Committee on the Bills of Exchange Bill 1882*, Parliamentary Papers, 1882 (244) VII, 585); Lord Bramwell, meanwhile, introduced the Bill to the House of Lords for its second reading, on the basis, which he reiterated in the *Bank of England* decision, that the Bill did not alter the common law: 18<sup>th</sup> July 1882, 272 *Hansard* (3<sup>rd</sup> Ser) at 833. See, further, D Cuisine, “The Cheque as an Assignment” 1977 *Jur Rev* 98.

<sup>52</sup> R B Jack (ed) *Banking Services: Law and Practice Report by the Review Committee* (Cmd 622, 1989) para 7. 55. See too Industry Department for Scotland, *Assignment and Attachment of Funds* (1990) [NLS: BoS; Shelfmark GSP. 2/1].

<sup>53</sup> The Scottish banks’ estimation of the annual administrative costs was £270,000 per year: *Hansard*, Public Bill Committee, 8th Sitting, October 30<sup>th</sup>, 2008, col 262 (Angela Eagle MP).

consumer's difficulty was finally dealt with by legislation in 1985.<sup>54</sup> But the banks were unable to secure their own amendment. One reason for this appears to be that many Scots lawyers had fastened on to the idea that the "funds attached" rule was some important manifestation of the Scottish legal tradition.<sup>55</sup> But, if so, it was not a tradition of which there was much to be proud, for the Scots common law, in this respect reflecting the experience in France and Belgium, was particularly confused.<sup>56</sup>

## 5.2. A Sketch of Scots Law pre-1882: *La doctrine de la provision*

A style Scottish protest of a bill of exchange for non-acceptance from 1722 runs thus:

"At § The § day of § years ... THE WHICH DAY in the presence of me Nottar publick & witness subscribeing compeared personally [M.F.I.] & passed to the personall presence of [D.F.] having in his hands ane bill of Exchange (whereof the abovementioned is ane just double) drawn be [P.G.] on the said [D.F.] of the daite, and payable in manner abovementioned, after production & reading wherof the said [M.F.I.] desired the said [D.F.] to answer & accept of the same And to make payment of the abovementioned soume of § therein mentioned at the time therein appointed Nevertheless the said D.F. altogether refused to accept of the said bill because as he alledged he had no mony nor provisione belonging to the said P.G. THEREFORE the said M.F.I. protested the said bill for non-acceptance and payment."<sup>57</sup>

The italicised words refer to "provisione".<sup>58</sup> "Provision" is a term of art in the French law of *lettres de change* and those systems which have drawn upon it.<sup>59</sup> The doctrine represented the one particular on which there was a divergence of

<sup>54</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s. 11(a), which added to the 1882 Act, in s 75A, the caveat that, where a cheque is countermanded before presentment, the drawee bank is deemed not to owe funds to the drawer.

<sup>55</sup> W A Wilson, "Letter to the Editor" 1984 SLT (News) 19 warned the profession of rumours he had heard that "some English solicitor in the DTI" was minded to repeal s 53 (2).

<sup>56</sup> *British Linen Bank v Carruthers* (1883) 20 SLR 619 at 620 *per* the Sheriff-Substitute: "The authorities on this point are conflicting; and some of them are far from clear". His opinion in not reported in the Session Cases report: (1883) 10 R 923.

<sup>57</sup> M C Meston and A D M Forte (eds) *The Aberdeen Stylebook 1722* (Stair Society vol 47, 2000) No 119, at 160. My emphasis in italics.

<sup>58</sup> For references to the use of this term, which can be found in German and Dutch, as well as French, sources: see H Speer (ed) *Deutsches Rechtswörterbuch: Wörterbuch der älteren deutschen Rechtssprache* vol 10 (2001) s.v. "provision" III, also available at: <http://drw-www.adw.uni-heidelberg.de/drw/>

<sup>59</sup> Chalmers, *Digest* (2<sup>nd</sup> edn 1881) vii described N Nouguiet, *Des Lettres de change et effets de commerce* (4th edn 1875) as "exhaustive". But no UK library holds a copy of the fourth edition of Nouguiet's work; and the only copy of the second edition of 1851 is the copy – used by Dove Wilson in his preparation of the third edition of Thomson's *Treatise on the Law of Bills of Exchange* (1865): see preface – in the library of the University of Aberdeen. A useful analysis of the doctrine, under Belgian law, is J Fontaine, *Etudes sur la lettre de change: La loi belge du 20 mai 1872 au regard de la théorie de la cession de la provision et de l'unification internationale* (1922). The most comprehensive study, however, is E E Hirsch, *Der Rechtsbegriff provision im französischen und internationalen Wechselrecht* (1930).

approach between the French law of provision, where presentment operated as an assignment; and the Dutch WvK and the German ADWO, where presentment did not transfer to the holder any right to the drawer's funds held by the drawee. Ultimately, the Dutch and German position was reflected in the law that was enacted in the 1882 Act for the UK and the British Empire,<sup>60</sup> with one exception. That exception was Scotland.

The doctrine of provision, in French law, is only barely regulated by the *code de commerce*, which did, however, provide that it was a pre-requisite to drawing a bill that the drawee was either in funds or indebted to the drawer;<sup>61</sup> indeed, acceptance presumed provision.<sup>62</sup> Moreover, in the event that the bill was protested for non-acceptance, the effect was to assign the drawer's claim against the drawee to the payee.<sup>63</sup> The detail of the doctrine, in France as in Scotland, is however found in the jurisprudence.<sup>64</sup>

Various rationales for the rule have been suggested. One is that the drawer ought not to be able to take consideration for the bill and retain the claim against the drawee;<sup>65</sup> reasoning that has been much criticised in Scotland in the context of sales of ownership of land. The case with land arises where the seller becomes insolvent after having received payment but before the buyer has been registered as owner: the seller, according to the House of Lords in one infamous case,<sup>66</sup> ought not to be able to retain both the price and the property; on sale, therefore, the object of the seller's ownership, the land, is no longer "beneficially owned" by the seller. But the general principle, subsequently accepted by the House of Lords,<sup>67</sup> is that an obligation to transfer is not somehow converted into a transfer by virtue of

<sup>60</sup> See section 53(1): "A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act, is not liable on the instrument. This sub-section does not extend to Scotland". Section 53(1) thus gave quietus to the dicta of Lord Chief Baron Eyre in his dissenting speech in *Minet v Gibson* (1791) 3 TR 481; 1 Ross' Leading Commercial Cases 76 at 89, that "The theory of a bill of exchange is, that the bill is an assignment to the payee of a debt due from the acceptor to the drawer, and that acceptance imports that the acceptor is a debtor to the drawer, or at least has effects in the drawers hands."

<sup>61</sup> *Code de commerce*, Art 115 (1875). This was inserted by the *Loi du 19 mars 1817, art 1<sup>er</sup>*. It should be noted that the numbering of the *code de commerce* provisions on *lettres de change* and cheques has changed at least three times: there is the original numbering, the post-Geneva Convention numbering and the post-2000 numbering.

<sup>62</sup> *Code de commerce*, Art 117 (1875). The modern provision is Art L 511-7 *Code de commerce*

<sup>63</sup> E E Hirsch, *Rechtsbegriff* 51, an analysis accepted by K Arndt, "Die Provision-Doktrin – ein Ersatz für die Sicherungsabtretung von Forderungen" 1931 *Juristische Wochenschrift* 3045 at 3046. Cf Anon, "Assignment by Check – a Comparative Study" (1951) 60 *Yale LJ* 1007.

<sup>64</sup> See, for example, Jestaz (1996) *RTD com* 886; Marty (1978) *RTD com* 307; Hécart 2003 *Dalloz* 539.

<sup>65</sup> A Nyssens and H de Baets, *Commentaire législatif Code commerce belge tiré des discussions parlementaires et des travaux préparatoires* (1881) II, 16 cited in Fontaine, n 22 above.

<sup>66</sup> *Sharp v Thomson* 1997 SC (HL) 66.

<sup>67</sup> *Burnett's Tr v Grainger* 2004 SC (HL) 19.

payment. The same criticism can be levelled at this rationale for the doctrine of provision.

The provision doctrine leaves a number of questions unanswered. It does not explain why, for example, the drawee cannot plead defences against the holder;<sup>68</sup> how the drawer is able, after issuing a bill, to issue further bills; why the drawee's liability on the bill arises only on acceptance; or, for that matter, how it is possible to draw a bill of exchange on a drawee who is not the drawer's debtor.

### 5.3. *Assignment of Provision: the Virtual Assignment*

In Scots law, the "assignment" that was said to operate on in favour of the holder of a bill was widely recognised to be "rather questionable".<sup>69</sup> And it is of interest that any reference to "assignation" is usually qualified in an adjective such as "virtual"<sup>70</sup> or "implied";<sup>71</sup> or that the effects of transfer of a bill are described merely as "equivalent"<sup>72</sup> or "tantamount"<sup>73</sup> to an assignation; or the term "assignation" is simply avoided in favour of the English term "assignment".<sup>74</sup> The first mention of a bill (in fact, a cheque) operating as an assignation – without words of qualification – is perhaps an opinion of Lord President Inglis in *British Linen Bank v Carruthers and Fergusson*,<sup>75</sup> a case decided post-1882 under pre-1882 law.<sup>76</sup>

There are various reasons that there could be no assignation on presentment for acceptance. Most flow from the underlying mandate contained in the bill. A bill or cheque is revocable by the drawer; at least until the grantee's presentment of it to

<sup>68</sup> For an attempt to explain the 'freedom from defences' incident on a *cession de la provision* analysis, see P Esmein, « Etude sur le régime juridique des titres à ordre et au porteur et en particulier l'inopposabilité des exceptions » 1921 *Revue trimestrielle de droit civil* 1.

<sup>69</sup> W Glen, *A Treatise on the Law of Bills of Exchange, Promissory Notes and Letters of Credit in Scotland* (2<sup>nd</sup> edn 1824) 238.

<sup>70</sup> *Stewart v Elliot* (1724) Mor 1463; *Thorold v Thomson* 14<sup>th</sup> July 1768 FC; *McLeod v Crichton* 14<sup>th</sup> January 1779 FC; Mor 16469. The *McLeod* case is reported under the title, 'Virtual'. The same adjective is used by L Goirand, *A Treatise upon French Commercial Law* (2<sup>nd</sup> edn 1898) 189: "by virtue of the transfer of the bill of exchange the provision is *virtually* withdrawn from the assets" (my emphasis).

<sup>71</sup> For example, *Campbell, Thomson & Co v Glass* 28<sup>th</sup> May 1803 FC, reported in Morison's *Dictionary of Decisions* under the heading 'Implied Assignation', No 2.

<sup>72</sup> E.g. *Waterston v City of Glasgow Bank* (1874) 1 R 470 at 479 per Lord Justice-Clerk Moncreiff; *British Linen Co Bank v Carruthers and Fergusson* (1883) 10 R 923 at 927 per Lord Shand.

<sup>73</sup> *Watt's Trs v Pinkey* (1853) 16 D 279 at 286 per Lord President M'Neill.

<sup>74</sup> R Thomson, *A Treatise on the Law of Bills of Exchange, Promissory Notes, Bank-Notes, Bankers' Notes and Checks on Bankers in Scotland* (2<sup>nd</sup> edn 1836) 355.

<sup>75</sup> *British Linen Co Bank v Carruthers and Fergusson* (1883) 10 R 923 at 927: "If that be so, and I am right in what I have said so far, that this cheque is not only equivalent to, but the same as an assignation, and operates the same effect, then I do not think the mere form of the document can alter that effect. I do not think it matters whether the words, 'assign, transfer, and make over' are used or not, if something precisely similar is done by a cheque in ordinary form".

<sup>76</sup> The First Division advised opinions on 6<sup>th</sup> June 1883.

the drawee. An outright assignation or even a mandate in *rem suam* is intrinsically irrevocable. Under section 75(2) of the 1882 Act, the banker's authority to pay the bill is determined by the customer's death.<sup>77</sup> But that proposition is inconsistent with an assignation, for a conventional assignee is not affected by the cedent's death, even if the death intervenes before intimation;<sup>78</sup> and even if the assignation was in the form of a gratuitous mandate in *rem suam*.<sup>79</sup> At common law the holder of a blank bond could also fill up his name after the death of the cedent.<sup>80</sup> One crucial case refers only to an obligation to grant an assignation on the part of the drawer; and that obligation would not be prestatable should a mid-impediment (i.e. diligence or insolvency) intervene.<sup>81</sup> And while some of the cases suggest that this "virtual" assignation takes place only on formal protest,<sup>82</sup> other authorities held that the indorsee of a bill that had not yet been presented for acceptance could somehow amount to an assignation.<sup>83</sup> Moreover, the "virtual" assignation operated only with respect to money claims; rights to performance of other obligations, such as a right to delivery of dried fish, were not covered by the common law "virtual" assignation, though such a right to performance could be assigned, outside the law of bills of exchange, in the usual way.<sup>84</sup>

The Scottish common law picture, prior to the 1882 Act, was therefore similar to the Belgian: one of byzantine complexity; and not one on which any rational theory of cession de la provision could be easily articulated.<sup>85</sup>

#### 5.4. Acceptance

The difference between an assignment of a claim and the drawing of a bill of exchange comes from the bill itself and, in tripartite cases, from the effect of the drawee's acceptance. It is the debtor's acceptance and signing of the bill that brings about the "*transformation profonde*"<sup>86</sup> in the pre-existing relationship between drawer and drawee; a point ignored by the funds-attached rule.

<sup>77</sup> See *Kirkwood & Sons v Clydesdale Bank* 1908 SC 20.

<sup>78</sup> This has been the law since the Confirmation Act 1691. See discussion in Anderson, *Assignation* (2008) para 5-17.

<sup>79</sup> *Muir v Ross' Exrs* (1866) 4 M 821 at 828 *per* Lord Deas. There is one post-1882 case: *Bank of Scotland v Reid* (1886) 2 Sh Ct Rep 376 but the logic of the case is difficult to follow.

<sup>80</sup> *Fair v Cranston* (1801) Mor 1677; *McDonnell's Tr v Rankin* 13<sup>th</sup> June 1817 FC.

<sup>81</sup> *McLeod v Crichton* 14<sup>th</sup> January 1779 FC; Mor 16469.

<sup>82</sup> *Mitchell v Mitchell* (1734) Mor 1464; *Gavin v Kippen & Co* (1768) Fac Coll No 79, 327; *Spotiswood v MacNeil* (1778) Mor 1464.

<sup>83</sup> *Ewing v Geills* (1698) Mor 1460.

<sup>84</sup> *Stewart and Ewing Competing* (1744) Mor 1493.

<sup>85</sup> J Fontaine, *Etudes sur la lettre de change* (1922) para 11, p 24 « nous n'attirions l'attention du lecteur sur le byzantinisme dans lequel [le droit de change] menace de sombrer et cela toujours à l'occasion de la provision » (we will not draw the reader's attention to the Byzantianism into which the [the law of bills of exchange] threatens to sink which is always the case with provision)."

<sup>86</sup> J Fontaine, *Etudes sur la lettre de change* (1922) No 28, p 66.



### 5.5. *The Antwerp Conference and Dove Wilson's About Turn*

In 1885, at the invitation of King Leopold of Belgium there took place at Antwerp a Congress on the Assimilation of Mercantile Law. Although there was no official UK government delegation, the UK was represented by seven lawyers, four of them Scots: Dove Wilson,<sup>87</sup> Sir John McDonnell KC,<sup>88</sup> Thomas Barclay,<sup>89</sup> and Mr J W Crombie.<sup>90</sup> The subject which occasioned lively discussion within the law of bills of exchange was the doctrine of *provision*.<sup>91</sup> And the discussion, for Dove Wilson at least, left a lasting impression: for it persuaded him that the traditional Scottish position, which he had single-handedly written into the 1882 Act, was wrong. The Franco-Scottish doctrine, he realised, confuses the bill of exchange with an assignment. Dove Wilson explained:

"Indeed, I was inclined to think that upon this whole point of provision, the Scotch law might with advantage be changed, so as to harmonise with the law of the majority of countries. Doubtless it came from the same source as the French, but it seems to me that to give an action upon a bill against a person who is not a party to it is not exactly consistent with the theory of contracts, and, for the sake of uniformity, we Scotch might well make the sacrifice – the more especially as, if it be desired to assign the drawer's funds in the drawee's hands, that can readily be done by letter of assignment."<sup>92</sup>

And, a decade later, Wilson's change of heart was, he suggested, vindicated by international experience:

"[The funds-attached rule] [has] been adopted by none. That clause safeguarding the old law of Scotland as to assignment of the provision by presentation for acceptance was retained because we were not ready to adopt the English Law, and because our system was still retained in France and in many other countries, for example, Belgium. The experience of Germany, Italy, England and all the Colonies, as also of America,

<sup>87</sup> For Dove Wilson, see n 42 above.

<sup>88</sup> Sir John Macdonell KC was an English lawyer who later became Professor of Comparative Law in the University of London. Macdonell's reflections are contained in "The Codification of the Commercial Law of the Empire" (1916) 16 *Journal of the Society of Comparative Legislation* 265. For Macdonell generally, see J W Cairns, "Comparative Law in Britain" in M Reimann and R Zimmermann (eds) *Oxford Handbook of Comparative Law* (2007) 131 at 136, n 19 and 156, n 97.

<sup>89</sup> Barclay, in his report of the proceedings, omits to mention McDonnell's attendance: T Barclay, "The Antwerp Congress and the Assimilation of Mercantile Law" (1886) 2 *LQR* 66 at 67. The difference in style between Barclay's report and those by Dove Wilson and McDonnell is marked. Barclay writes of himself as an Englishman, but he was born in Fife. He was educated in London, Paris and Jena before being called to the English bar. He was living in Paris from the 1870s and considered himself sufficiently Scottish to found there, in 1895, the Franco-Scottish Society. A study of Barclay is lacking, but useful biographical details are in his *Times* obituary: "Sir Thomas Barclay" *The Times*, Thursday, 6<sup>th</sup> February, 1941, 7 and in the online edition of *Who Was Who*: <[www.ukwhoswho.com](http://www.ukwhoswho.com)>.

<sup>90</sup> Crombie (1858-1908) too was an Aberdonian and, later, Liberal MP for Kincardineshire.

<sup>91</sup> J Dove Wilson, "Unification of the Law of Bills of Exchange" (1886) 2 *LQR* 297 at 304.

<sup>92</sup> *Ibid.*, 305-306.

shows that it is not suited to modern banking, and that we also can no longer maintain it."<sup>93</sup>

Better late than never, Dove Wilson, as a result of comparative law discussion in Antwerp, came to the view that a position for which he had succeeded in obtaining special treatment was mistaken. But, by then, the die had been cast. The Scottish banks who so detested the rule would wait long for a suitable opportunity – for over a century and for a crisis, where public focus was on matters of considerably greater import – to procure the abolition of Dove Wilson’s mistaken view of the law of presentation of bills. One question of wider significance is whether we will see other European jurisdictions, which still nominally subscribe to *la doctrine de la provision*, take a similar step to that taken in Scots law.

### 5.6. *Lessons for Codification and Unification*

There are, I think, a number of wider lessons that can be drawn from the history of the “funds-attached” rule. In the first place, the episode demonstrates the truism that draftsmen have a disproportionate influence: it is their view of the law that prevails. This observation is, however, merely that, an observation. The situation is unavoidable and not necessarily undesirable.

Secondly, and more importantly, a rule embodied in legislation, whether right or wrong, can become entrenched; and provisions in legislation described or recognised as a “code” are likely to become more entrenched than most. The history of the “funds-attached” rule demonstrates how difficult it can be to achieve change. If it took a century to change a single line of an admittedly despised provision in a UK Act which had limited geographical extent, we have an indication of how difficult it may be to change any European harmonisation instruments that are introduced. Again, however, that is merely an admonition about the importance of comparative analysis in preparation. It cannot be used an excuse to do nothing. As one correspondent remarked of the proposed UK Sale of Goods Act 1893 – another minor codification which fundamentally changed Scots law – “because we cannot do everything is no reason why we should not do something.”<sup>94</sup>

Thirdly, and at the risk of sounding heretical, the “funds-attached” episode is a good example, for harmonisation instruments, against according a margin of appreciation to local interpretations of uniform rules. Fourthly, there may be a danger in conceding piecemeal exceptions to general rules. The “funds-attached” rule, on one view, was a kind of reverse bifurcation whereby a mistaken view of the perceived unitary nature of the Scots law of assignation was preserved at the expense of a functional bills of exchange law. The converse position is today evident

<sup>93</sup> J Dove Wilson, “Proposed Imperial Code of Commercial Law – A Plea for Progress” (1896) 8 *Jur Rev* 329 at 343. For other countries that adopted the same approach as the “old law of Scotland”, see Hirsch, *Rechtsbegriff*, 91-116.

<sup>94</sup> J G S “Sale of Goods Bill” (1889) 1 *Jur Rev* 310.

in some European Union legislation,<sup>95</sup> as well as in proposed unification instruments<sup>96</sup>. The general point is that, in any harmonisation project, pleas for exceptional treatment should be scrutinised with care.

## 6. Harmonisation of the law of assignment

### 6.1. *Transfer*

Transfer, in Scots law as in other civil law systems, is normally unitary. There is no spectrum, no relativity. It is all or nothing. It is not possible to transfer patrimonial rights for some purposes but not for others.<sup>97</sup> One of the major difficulties with the provision doctrine in bills of exchange is that its rules are inconsistent with this basic underlying general principle.<sup>98</sup> But it is important to recognise that in an assignment case, in any legal system, the presence of the *debitor cessus* means that transfer cannot always provide the solutions to debtor protection issues. In systems where there is no formal requirement for debtor notification to effect a transfer (as in Germany), special debtor protection rules are required. But even in systems, such as Scots law, which do have onerous formal rules on intimation to the debtor, in some cases the law may hold intimation to have occurred although the debtor does not, in fact, know of it. In such a case, although the assignation operates as a transfer, the debtor cannot be prejudiced. As others might say, the assignment is relatively valid: it binds all except the ignorant *debitor cessus*. The characterisation of assignment is important as the requirement for formal intimation as a constitutive requirement of transfer is now considered to be too onerous for commercial practice. The Scottish Law Commission has recommended reform and has looked

<sup>95</sup> See, for example, in the context of financial contracts, the Financial Collateral Directive, 2002/47/EC, Art 6 of which requires financial contracts, such as repurchase agreements, to be given effect according to their terms: they are not therefore subject to national insolvency laws. In the consumer field, Consumer Credit Directive 2008/48/EC, Art 17 requires “notice” of the assignment of any credit claims arising out of a regulated consumer credit agreement “as soon as reasonably possible”. There is an exception, where, in the words of Art 17 of the Directive, “the original creditor, by agreement with the assignee, continues to service the credit vis-à-vis the consumer.” It is not at all clear why this rule was necessary, not least since it may prejudice a consumer *debitor cessus* who, as a result of the notice, may now be held to be in bad faith to pay the cedent. Under domestic laws, the *debitor cessus* who pays the cedent in good faith is normally protected.

<sup>96</sup> DCFR, Art III.-5:101(2) and PICC, Art 9.1.2 expressly do not apply to financial contracts.

<sup>97</sup> A von Tuhr, *Allgemeiner Teil des deutschen bürgerlichen Rechts* (1910) vol 1, § 2, at 72; G L Gretton, “Radical Rights and Radical Wrongs” 1986 *Jur Rev* 51 and 191. French law introduced the concept of a fiduciary transfer for the purposes of security only in 2008: Art 2018-2 *Code civil*. But the trends identified by von Tuhr and Gretton are evident there too: P Simler and P Delebecque, *Droit civil: Les sûretés, la publicité foncière* (5<sup>th</sup> edn 2009) para 667.

<sup>98</sup> So, in French law, where a creditor draws on his debtor, the effect of drawing of the bill is to render the claim non-attachable by creditors: see the decisions discussed by *RTD com* 1951, 549; by Jestaz, *RTD com* 1966, 886; and by Marty, *RTD com* 1978, 307.

both to modern European civil codes as well as to international harmonisation instruments.<sup>99</sup>

## 6.2. *Circularity in the DCFR*

But to recognise that assignment has two aspects is not to say, with a French writer so well-known that I have not managed to trace him that, *le monothéisme juridique est mort*.<sup>100</sup> On the contrary, transfer is the basic idea behind a cession of rights. And the failure to remember this may give rise to strange results. “An ‘assignment’ of a right,” says the DCFR, “is the transfer of the right from one person (the ‘assignor’) to another person (the ‘assignee’).”<sup>101</sup> Indeed it is. An assignment is effected by an “act of assignment”,<sup>102</sup> where the right to be assigned exists and the right is assignable.<sup>103</sup> This formulation of the DCFR is uncontroversial. And, logically, the DCFR provides that an assignment takes place when these requirements are satisfied (or at such later time as the act of assignment may provide).<sup>104</sup> But a difficulty then arises with the priority provisions. For, although debtor notification is not one of the requirements for transfer, notice determines priorities between transferees.<sup>105</sup>

The priorities provision is problematic because it may give rise to circularity. Suppose Charlie is the creditor of Danielle. The claim is assignable. Charlie concludes a valid act of assignment of the claim in favour of Alan on day 1. On day 2, one of Charlie’s creditors, Mary, arrests (by way of *saisie-attribution*) the claim by serving the relevant paperwork on Danielle. On day 3 Charlie concludes an act of assignment in favour of David. David notifies Danielle on Day 4. On day 5 Alan notifies. According to the DCFR, David is preferred to Alan; Alan is preferred to Mary; but, under most domestic laws (and the DCFR, admittedly, does not contain provisions on arrestment), Mary is preferred to David. In practical terms, the debtor, Danielle, should pay Mary, for that is the first notice that the Danielle received.

<sup>99</sup> Scottish Law Commission, *Discussion Paper on Moveable Transactions* (2011), for which see R G Anderson and J W A Biemans, “Reform of assignation in security: lessons from The Netherlands” (2012) 16 *Edinburgh Law Review* 24.

<sup>100</sup> P Catala, « La transformation du patrimoine dans le droit civil moderne » 1966 *RTD civ* 185 at 186: « [comme] un auteur aux vues pénétrantes écrivait récemment: ‘le monothéisme juridique est mort’ ».

<sup>101</sup> DCFR Art III.-5:102(1).

<sup>102</sup> Defined in Art III.-5:102(2) as “a contract or other juridical act which is intended to effect a transfer of the right.” For critical discussion of the use of the “juridical act” concept in the DCFR: compare J P Schmidt, “Der ‘juridical act’ im DCFR” 2010 *ZEuP* 304; and P Hellwege, “Allgemeines Vertragsrecht und ‘Rechtsgeschäfts’-lehre im Draft Common Frame of Reference (DCFR)”, 2011 *AcP* 665

<sup>103</sup> DCFR Art III.-5:104.

<sup>104</sup> DCFR Art III.-5:114(1).

<sup>105</sup> DCFR Art III.-5:120(1).

The solution to this conundrum is easy: once notice is abolished as a constitutive requirement for transfer, notice becomes an issue only of debtor protection. And the formulation in the DCFR on that point is perfectly acceptable.<sup>106</sup> The difficulties, I think, arise as a result of neglecting the basics of transfer. If transfer to Alan occurred on day 1, Charlie no longer had any claim to arrested, or indeed, anything to transfer to David, a point made some time ago by a House of Lords panel sitting in an English appeal containing, unusually, a majority of Scottish judges. The appeal concerned the peculiar English rules in favour of the *bona fide* purchaser for value without notice.<sup>107</sup> If an equitable assignment on day 1 is sufficient to bind the assignor's creditors, how can the assignor still be considered to be able to assign anything on day 2? The difficulty with the Art III.-5120(1) DCFR – and indeed with Art 11:401 PECL before it – is that the English “rule in *Dearle v Hall*”<sup>108</sup> has been bolted on to what is otherwise a civil law model of assignment without notice.<sup>109</sup>

The difficulties in the DCFR provisions on assignment are not so far removed from the difficulties encountered in codifying the “funds-attached” rule in the UK 1882 Act. The subject touches on those areas of the European private law which no one wishes even to try harmonising: diligence (*Zwangsvollstreckung*) and insolvency.

### 6.3. Uncodified Harmonisation

Neither PECL nor PICC nor the DCFR pays much attention to some of the core general principles of the law of transfer, principles which, in the main civil law systems, are not actually found in the various codifications. As the English law of assignment cannot be understood without a knowledge of equity, it is questionable to what extent the French or German law of assignment can be understood without some knowledge of the uncodified doctrinal principles *opposabilité* or *relative Wirksamkeit*.<sup>110</sup> And the same point can be made of other civil law doctrines, in other areas, that are not found in the civil codes: the German *Anwartschaftsrecht* is perhaps the classic example. The difficulties are, again, analogous to the issues that arose with attempts to codify the Scottish common law “funds-attached” rule; and the French experience of not even trying to codify it. The Scottish experience shows that a critical analysis would have been better and reform should have changed the common law, not just attempt to describe it, warts and all.

<sup>106</sup> DCFR Art III.-5:120(2).

<sup>107</sup> *BS Lyle v Rosher* [1959] 1 WLR 8.

<sup>108</sup> (1828) 3 Russ 1; 38 ER 475.

<sup>109</sup> There is an expert overview of the DCFR assignment provisions by Eric Clive: “The Assignment Provisions of the Draft Common Frame of Reference” 2010 *Jur Rev* 275.

<sup>110</sup> E Cashin-Ritaine, *Les cessions contractuelles de créances de sommes d'argent dans les relations civiles et commerciales franco-allemandes* (2001) 42: « L'étude de la notion d'opposabilité en droit français est essentielle pour comprendre le mécanisme de la cession de créance »; H Eidenmüller, ‘Die Dogmatik der Zession vor dem Hintergrund der internationalen Entwicklung’ (2004) 204 *Archiv für die civilistische Praxis* 457. See too R Wintgen, *Étude critique de la notion d'opposabilité* (2004) and G F Lubbe, ‘Assignment’ in H L MacQueen and R Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* (2006).

## 7. Conclusions

It is fair to say that there is little appetite in the UK, as an EU member state, for European harmonisation, unless that harmonisation means bringing Europe into line with English law or the practice of the City of London (as, for instance, happened with the Financial Collateral Directive). But the history of UK law reform in the nineteenth century demonstrates that comparative law scepticism is a relatively recent phenomenon. Our Victorian forebears were able and interested in European developments, whether to promote harmonisation or, at least, to find benchmarks against which they could test domestic rules.

The Scottish experience, within the UK, is, I think, of wider interest. It may be observed that, in the area of nineteenth century law reform briefly considered here, Scots took an enthusiastic and active role. At least in this area, comparative law was of considerable utility. But whereas the Scottish interest in comparative law remains, it is an interest, with honourable exceptions, which is not generally shared in England. Perhaps this is, at least in part, because debates about codification and unification are particularly important for small legal systems: it is easier for a small system with fewer resources to reflect on the content of its rules in particular areas in a way that would not be possible in a traditional, organic, national development. Sometimes, of course, such reflections can lead one to question the very axioms on which a national system, in any area, is based. But that is an attitude, in my view, which forms the lifeblood of academic study.

Prior to the 1882 Act, Scots law was in the camp of other French-based legal systems, without any international harmonisation instrument. With the 1882 Act, Scots law, through codification, escaped harmonisation with the rest of the British Empire. As we reflect upon the inclusion in the Bills of Exchange Act 1882 of the funds-attached rule, we can see what national lawyers, determined to preserve a national tradition, can achieve. But the debate leading up to the inclusion of the rule, together with the subsequent reflections of those responsible for it, demonstrate that a rule's nationality is of much less importance than its rationality. This is the value of comparative law study. Had Dove Wilson benefited from the comparative discussion he participated in at Antwerp in 1881 rather than in 1884, it is unlikely the 1882 Act would have contained bespoke "funds-attached" provisions.

The conference on which this paper is based took place in a week in which we learned of the death of one of the greatest lawyers Scotland has ever produced: Lord Rodger of Earlsferry. One is reminded of his healthy distrust of national rules which do not appear, on critical analysis, to be rational. As Lord Rodger remarked in an English appeal:

"In classical Roman law the jurists were at pains to ensure that the various civil law and praetorian remedies worked together in harmony in relation to the same facts. One

of the hallmarks of a good modern code is that its provisions should interrelate and interact so as to achieve a consistent application of its overall policy objectives. Complete harmony may well be harder to achieve in an uncoded system – hence the constant attention paid by the classical jurists to the problem – since different remedies will have developed at different times and in response to particular demands... the courts are conscious that inconsistencies should be avoided where possible.”<sup>111</sup>

I would not wish to cite Lord Rodger out of context and suggest he was a supporter of codification since it would be fair to say, I think, that he was not. But the passage highlights, above all, the need for all European lawyers to look critically at their own national systems in a comparative context. Codification can offer to a small system like Scotland coherence, clarity and order which an uncoded system must lack. Such values, of course, are not the only values in a legal system. They may not be vote winners. And, as has been repeatedly pointed out, codification and harmonisation guarantees not even transparency, far less fundamental freedoms.<sup>112</sup> But while it is true to say that “lawyers are made for the law, not the law for lawyers” it is generally lawyers who have to find legal solutions, particularly in technical private law subjects. Uncoded systems where the law is inaccessible *even to lawyers* pay only lip service to the ideal of the rule of law. Codification and harmonisation of technical rules of private law brings clarity and order for lawyers. Engaging in comparative discussion about harmonisation and codification in any area of the law is of immense value – particularly for uncoded systems. As any backpacker knows, the journey is often more fulfilling than the arrival at the terminus.

<sup>111</sup> *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 AC 1339 at para [77]. Note the “where possible”: for, as Lord Bingham observed, “the common law is not intolerant of anomaly”: *A v Secretary of State for the Home Department* [2005] UKHL 71 at para [48].

<sup>112</sup> See, for example, B Leoni, *Freedom and the Law* (1961; 3<sup>rd</sup> edn 1991) 92-93.